

**UNITED STATES DISTRICT COURT  
DISTRICT OF NEVADA**

UNITED STATES OF AMERICA,

Plaintiff,

v.

EDMUND C. BOTHA,

Defendant.

Case No. 2:06-CR-00274-KJD  
2:13-CV-001824-KJD

**ORDER**

Presently before the Court is Defendant's Motion to Accept Late Filing of Notice of Appeal (#153). The Government filed a response (#154).

The Court denied Defendant's Motion to Vacate, Set Aside or Correct Sentence (#147) on July 7, 2014 finding that Botha's claims had all been rejected on direct appeal. Though the notes made by the clerk of the court in the docket entry text state that notice was sent to Defendant manually, there is no record to which address notice was sent. The Notice of Electronic Filing ("NEF") associated with the docket entry does not reflect a postal mailing to Defendant at any address. Further, the Government having filed a response asserting that it does not oppose acceptance of the Notice of Appeal as timely, the Court finds that no party is prejudiced. Therefore, in accordance with Federal Rule of Appellate Procedure 4(a)(6), the Court reopens the time to file an appeal and accepts Defendant's Notice of Appeal (#152) filed on October 30, 2014 as timely filed.

1           However, in order to proceed with an appeal, petitioner must receive a certificate of  
2   appealability. 28 U.S.C. § 2253(c)(1); Fed. R. App. P. 22; 9th Cir. R. 22-1; Allen v. Ornoski, 435  
3   F.3d 946, 950-951 (9th Cir. 2006); *see also* United States v. Mikels, 236 F.3d 550, 551-52 (9th Cir.  
4   2001). Generally, a petitioner must make “a substantial showing of the denial of a constitutional  
5   right” to warrant a certificate of appealability. Id.; 28 U.S.C. § 2253(c)(2); Slack v. McDaniel, 529  
6   U.S. 473, 483-84 (2000). “The petitioner must demonstrate that reasonable jurists would find the  
7   district court's assessment of the constitutional claims debatable or wrong.” Id. (*quoting Slack*, 529  
8   U.S. at 484). In order to meet this threshold inquiry, the petitioner has the burden of demonstrating  
9   that the issues are debatable among jurists of reason; that a court could resolve the issues differently;  
10   or that the questions are adequate to deserve encouragement to proceed further. Id. Petitioner cannot  
11   meet his burden because his § 2255 motion raised five claims of error, each of which had been raised  
12   on direct appeal and explicitly considered and rejected by the Court of Appeals. Therefore, no  
13   reasonable jurist could find that the issues are debatable or the Court’s assessment of his claims  
14   wrong. Therefore, the appeal is frivolous and the Court declines to issue a certificate of appealability.

15           Accordingly, IT IS HEREBY ORDERED that Defendant’s Motion to Accept Late Filing of  
16   Notice of Appeal (#153) is **GRANTED**;

17           IT IS FURTHER ORDERED that the Court declines to issue a certificate of appealability.

18           DATED this 5th day of December 2014.

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22           Kent J. Dawson  
23           United States District Judge  
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